

James Madison
CENTER FOR FREE SPEECH

January 3, 2000

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Notice of Inquiry
regarding Internet
campaign activity

JAN 4 9 56 AM '00

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

HONORARY CHAIRMAN
**The Honorable
Mitch McConnell**

To Whom It May Concern:

On behalf of my client, the James Madison Center for Free Speech, I hereby submit these comments in response to the Notice of Inquiry, issued November 5, 1999, regarding the use of the Internet for campaign activity. In the event the Commission holds hearings on this Notice, I wish to testify.

While the Commission is to be commended for its initiative in examining issues raised by the use of the Internet to conduct campaign activity, the Notice of Inquiry clearly demonstrates the pitfalls of any detailed regulatory approach to the Internet under the Federal Election Campaign Act.

In deciding whether to regulate Internet activities at all, and if so, whether these activities differ to such a degree as to require different rules, the Commission must not lose sight of the big picture.

The 1974 amendments to FECA constituted the first effort to establish a comprehensive, national system of campaign finance regulation. The perceived "need" to do something in the wake of the Watergate scandal led to these 1974 amendments which limited individual, political party, and PAC contributions to candidates, limited personal spending by candidates, placed ceilings on overall campaign spending for federal offices, and limited independent spending by groups not affiliated with a candidate or campaign. The amendments also established the public funding mechanism for the presidential election.

Several of these amendments were found not to pass constitutional muster in *Buckley v. Valeo*, 424 U.S. 1 (1976), and the basic FECA framework, after *Buckley* and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), exists to regulate quid pro quo corruption which may result from large contributions, and to prevent the corruption of the whole electoral process from an influx of corporate and labor union money.

GENERAL COUNSEL
James Bopp, Jr., Esq.

January 3, 2000

Page 2

Buckley was concerned with multi-million dollar gifts, and a resulting quid pro quo, i.e., contributions for political favors. The *Austin* Court was concerned with corruption of the entire electoral process from an influx of money from the economic marketplace into the political marketplace.

It is against this backdrop that we must analyze whether Internet activity should be subjected to the tangle of governmental restrictions that has already ensnared other areas of our political speech. When one starts with the evils found by the *Buckley* and *Austin* Courts as sufficiently compelling to justify regulation of political speech, one sees that electoral activity on the Internet poses no such evil.

First, what is the quid pro quo that results from Internet activity? Any "contribution" that results from a hyperlink to a candidate's web page is de minimis. Costs associated with other Internet activities, such as posting candidate-related materials and voting records, on-line discussions, and mass e-mailing, most often involve only negligible costs. With the rapidly increasing use of the Internet by millions of Americans, a political favor in exchange for an Internet contribution becomes decreasingly likely.

It is incontrovertible that in today's world, it takes a lot of money for political speech to be heard. Indeed, the ever-increasing burdensome search for money has led handfuls of senators and congressmen to retire, and has caused more than one presidential hopeful to decline to run, or drop out early. However, the Internet contains the opportunity to change all of this. The "democratizing" effects of Internet communication are evident: "individual citizens of limited means can speak to a worldwide audience on issues of concern to them." *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1997)(Dazell, J., concurring), *aff'd*, 521 U.S. 844 (1997).

The already complicated campaign finance laws have been a substantial hindrance to grassroots campaign activity and voter education efforts. In 1994, both the U.S. Chamber of Commerce and the American Medical Association decided not to publish and distribute candidate endorsements to thousands of their members, in response to threats of litigation from the Commission, because it was not "worth the legal risk." Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1084 (1996).

Regulating campaign activity on the Internet would effectively dissuade individuals from participating in the political debate. In posited questions regarding application of the FECA to the creation of individuals' web sites, the Commission asks what costs of an individual's contribution or independent expenditure, i.e., the initial cost of the computer hardware used to operate the web site, the costs of software used, fees paid to maintain the site, should be taken into account. Thus, it is plainly evident that such regulation, if enacted, would cause all but the most wealthy individual, with the financial ability to hire the lawyers and accountants necessary to comply with these regulations, to steer clear of Internet activity. Or worse, unsuspecting

individuals would find themselves the subjects of FEC investigations.

Federal regulation of campaigns has all but driven grass-roots action from the political scene. James L. Buckley, *Bucks and Buckley*, Nat'l Rev., Sept. 27, 1999, at 41. Increasing federal regulation discourages, rather than encourages, the hallmark of political participation -- individual action. It is imperative to the functioning of our democracy that individual participation in political debate not be hampered by government attempts to regulate the minutiae of the biggest marketplace of ideas this nation has ever seen, in fear of individuals, candidates, parties, and PACs significantly influencing the outcome of federal elections.

The Internet continues to be the most participatory marketplace of mass speech that this country has ever seen. *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1997)(Dazell, J., concurring), *aff'd*, 521 U.S. 844 (1997). As Judge Dazell wrote,

[I]ndividual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalist and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche.

Id. Therefore, rather than regulate the minutiae of this speech, the Supreme Court has found a high level of protection for Internet speech despite compelling state interests in shielding minors from pornography and pedophiles. *Reno v. ACLU*, 521 U.S. 844 (1997). As Judge Dazell stated in his concurrence, "[m]y examination of the special characteristics of Internet communication, and review of the Supreme Court's medium-specific First Amendment jurisprudence, lead me to conclude that the Internet deserves the broadest possible protection from government-imposed, content-based regulation." *ACLU v. Reno*, 929 F. Supp. at 881.

Campaign finance reformers have alleged that the political marketplace is dominated by wealthy voices, and that these voices dominate, and in some cases may even create, the national debate. Individual citizens' participation, they say, is passive, or even nonexistent. It cannot be seriously disputed that American citizens need more information, not less, about candidates, issues, officeholders, and their government. In a National Election Studies Guide to Public Opinion and Electoral Behavior, from 1976 to 1984, the percentage of Americans that did not know which party had the most members of Congress after an election, ranged from 42% to a dismaying 85%. See Attachment A.

Finally, it is imperative to keep in mind that the Founding Fathers envisioned the First Amendment as a limit on the power to regulate, not as a source of power. The freedom of speech is not a grant of power to the government; rather, it is a withholding of power from the government. See Lillian R. BeVier, Campaign Finance "Reform" Proposals, A First Amendment Analysis, Cato Policy Analysis No. 282 (Sept. 4, 1997). The First Amendment was designed to

January 3, 2000

Page 4

protect political speech, rather than limit it.

For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

Bridges v. California, 314 U.S. 252, 263 (1941). Therefore, any proposal to regulate Internet activity must first identify the evil to be combatted. Where there is no evil from corruption of the candidate, i.e., *Buckley*, nor from corruption of the process, i.e., *Austin*, there should be no regulation. Furthermore, as Internet activity increases participation by individuals, and Americans desperately need more information to be self-governing, Internet activity should be left alone by the Commission.

Thank you for your consideration of this matter.

Sincerely,

JAMES MADISON CENTER FOR
FREE SPEECH



James Bopp, Jr.
General Counsel

Heidi K. Meyer
Attorney



The mission of the National Election Studies (NES) is to produce high quality data on voting, public opinion, and political participation that serve the research needs of social scientists, teachers, students, and policy makers concerned with understanding the theoretical and empirical foundations of mass politics in a democratic society. Central to this mission is the active involvement of the NES research community in all phases of the project from study planning through data analysis.

[\[Read More...\]](#)

Search the NES Web site:

Search for

Last Updated: October 8, 1999

New Updates!

- [NES Guide to Public Opinion and Electoral Behavior](#) updated with 1998 data. ~~NEW~~
- [Download the new 1948-1998 Cumulative Data File!](#) ~~NEW~~

This page maintained by the NES Staff. Please send comments to: nes@umich.edu.

How to cite information obtained from the NES Website

The materials on this website are based on work supported by the National Science Foundation under Grant Nos.: SBR-9707741, SBR-9317631, SES-9209410, SES-9009379, SES-8808361, SES-8341310, SES-8207580, and SOC77-08885.

SITEMAP
ANNOUNCEMENTS Website changes, data releases, errata, newsletters...
ABOUT NES History, overview, personnel, contact information...
JOIN THE NES RESEARCH COMMUNITY
DOWNLOAD ANY DATASET
STUDY & DATASET RESOURCES Overviews, questionnaires...
THE NES DATASET VERSION TABLE Is your dataset up-to-date?
THE NES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR Tables and graphs...
THE NES BIBLIOGRAPHY Works that use NES data.
REPORTS AND PAPERS Pilot Studies, Technical Reports, and Related Papers...
THE COMPARATIVE STUDY OF ELECTORAL SYSTEMS (CSES)

About NES

NES conducts national surveys of the American electorate in presidential and midterm election years and carries out research and development work through pilot studies in odd-numbered years. The NES time-series now encompasses 23 biennial election studies spanning five decades. The longevity of the NES time-series greatly enhances the utility of the data, since measures can be pooled over time, and both long-term trends and the political impact of historical events can be identified.

Time-Series Studies, conducted around each national election. In presidential election years, the study is conducted both before and after the election (that is, a pre/post-election study), while in congressional election years the study is conducted only after the election (a post-election study). Each election study addresses a wide range of substantive themes including: expectations about the election outcome; perceptions and evaluations of the major parties and their candidates; interest in the campaign; information about politics; partisanship; assessments of the relative importance of major problems facing the country; attention to campaign coverage in the mass media; feelings of political efficacy; political values; conservatism vs. liberalism; trust in government; political participation; vote choice; economic well-being; positions on social welfare, economic, social, and civil rights issues; evaluations of a wide range of political figures and groups; detailed demographic information; and measures of religious affiliation and religiosity. [More information.](#)

Research and Development (Pilot) Studies, normally conducted in the 'off-years' when there is no national election. These studies are designed to test new, or refine existing, instrumentation and study designs, all in order to improve the Time-Series Studies. [More information.](#)

Other Major Data Collections, which include ad hoc stand alone studies such as the Senate Election Studies and the 1982 Methods Comparison Study, as well as the panel studies which span individual Time-Series studies. [More information.](#)

The following links provide additional information about NES:

- [The Origins of NES](#)
- [Information about the NES Research Organization](#)
- [Contact the NES Project Staff](#)
- [An Overview of the Study Planning Process](#)
- [Members of the NES Board of Overseers and Project Staff](#)
- [Support from the National Science Foundation](#)

The NES Guide to Public Opinion and Electoral Behavior

Which Party Had Most Members of Congress Before the Election 1958-1998

	58	60	62	64	66	68	70	72	74	76	78	80	82	84	86	88	90	92	94	96	98
Incorrect, Don't Know, No:	33	38	**	36	31	30	30	36	**	39	41	29	68	43	67	41	51	41	30	27	34
Correct:	47	64	**	64	69	70	30	64	**	61	59	71	32	53	33	59	49	59	70	73	66

PERCENTAGE WITHIN STUDY YEAR

Table IC.1

Source: The National Election Studies

Link to the ASCII text version of this table.

QUESTION TEXT:

1958-1968: "Do you happen to know which party had the most Congressmen in Washington before the election this/last month?" (IF NECESSARY:) "Which one?"

1970 and later: "Do you happen to know which party had the most members in the House of Representatives in Washington before the elections (this/last) month?" (IF NECESSARY:) "Which one?"

Graph of Response:

Incorrect, DK/No
 Correct

Percent among demographic groups who responded:

Incorrect, DK/No
 Correct

This question is variable VCF0729 in the NES Cumulative Data File dataset. Consult the Cumulative Data File codebook for complete question text and annotation. Weight variable VCF0008B was used to produce this table.

(Table generated: 1/5EP99)

Return to the [Guide Index](#)
Return to the [National Election Studies Home Page](#)